

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32038  
H/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - June 22, 2011

PETER B. SKELOS, J.P.  
THOMAS A. DICKERSON  
L. PRISCILLA HALL  
LEONARD B. AUSTIN  
ROBERT J. MILLER, JJ.

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2010-07178

DECISION & ORDER

Ernest Varricchio, appellant, v Dennis Sterling,  
et al., respondents.

(Index No. 20060/04)

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Palmieri & Palmieri, Ozone Park, N.Y. (Ginamarie M. Palmieri of counsel), for appellant.

Law Office of Golding and Associates PLLC, New York, N.Y. (Geovanny Fernandez of counsel), for respondents.

In an action to foreclose a mortgage, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Vaughan, J.), entered June 7, 2010, as denied that branch of his motion which was to restore the action to active status.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the plaintiff's motion which was to restore the action to active status is granted.

On July 16, 2008, this pre-note of issue action was marked "other final disp." after the parties failed to appear for a compliance conference. CPLR 3404 does not apply to this pre-note of issue action (*see Mitskevitch v City of New York*, 78 AD3d 1137, 1138; *Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 199). Furthermore, there was neither a 90-day notice pursuant to CPLR 3216, nor an order dismissing the complaint pursuant to 22 NYCRR 202.27 (*see Mitskevitch v City of New York*, 78 AD3d at 1138; *Casavecchia v Mizrahi*, 62 AD3d 741, 742; *Burdick v Marcus*, 17

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AD3d 388; *123X Corp. v McKenzie*, 7 AD3d 769). Accordingly, that branch of the plaintiff's motion which was to restore the action to active status should have been granted.

SKELOS, J.P., DICKERSON, HALL, AUSTIN and MILLER, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court